

SERVED: May 3, 1994

NTSB Order No. EA-4146

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 13th day of April, 1994

JACK M. SITES,	)	
	)	
Applicant,	)	
	)	
v.	)	
	)	Docket No. 152-EAJA-SE-
DAVID R. HINSON,	)	12456
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

Applicant has appealed the decision of Administrative Law Judge Jerrell R. Davis, issued November 16, 1992 (a copy of which is attached). In that decision, the law judge denied applicant's request, filed pursuant to 5 U.S.C. 504, the Equal Access to Justice Act, as amended (EAJA), for attorney fees and expenses in connection with the Administrator's order suspending Mr. Sites' commercial pilot certificate for carelessness. That

order was dismissed prior to hearing, at the Administrator's request, and pursuant to a settlement agreement. The law judge dismissed the subsequent EAJA application, on finding that the Administrator had been substantially justified in pursuing the matter. See 49 U.S.C. 504(a)(1). We affirm the law judge's decision.<sup>1</sup>

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<sup>1</sup>We agree with the majority of the law judge's analysis and conclusions. We do not, however, agree with or adopt the law judge's characterization of competing analytical testimony as raising credibility questions. See Administrator v. Ruhmann, NTSB Order EA-3847 (1993) at 2 (expert medical testimony does not raise issues of credibility).

Applicant was pilot in command of a Beechcraft BE-95 when it crashed on landing at Kansas' Johnson County Executive Airport. FAA investigators examined the aircraft extensively. Applicant does not challenge their findings that: 1) the cockpit instruments and motor transmission indicated that the landing gear was down and locked and all indicators of gear position were in agreement, i.e., indicating that both were down and locked;<sup>2</sup> and 2) parallel propeller gouge marks on the runway demonstrated that both propellers had simultaneously struck the runway 34 times over hundreds of yards, the right propeller strikes then ceased while the left strikes continued, moving increasingly to the left, until the aircraft left the runway.

From this evidence and other results of examination and investigation, the FAA formed the view that nothing had prevented applicant from making a normal gear-down landing, and that:

continuation of the left propeller strikes, but cessation of the right propeller strikes after 34 strikes, is consistent with the pilot realizing that the gear had been placed in the up position, and then belatedly cycling the gear. Due to aircraft attitude, the left gear was unable to fully extend. The right gear and nose gear extended and remained extended until the aircraft departed the runway, at which time the nose gear failed due to the field conditions.

Id. at 7.

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<sup>2</sup>The right gear was found down and locked. The left gear had been damaged in the crash and was braced in the down and locked position for towing. Applicant has not, however, rebutted the Administrator's repeated statement that applicant acknowledged to the FAA that post-crash gear retraction tests showed both sides working normally. Answer to EAJA Application at 5.

The law judge agreed that this position was reasonable in fact.<sup>3</sup> On appeal, applicant argues that certain information provided to the FAA at an informal conference compelled a conclusion that mechanical failure, not applicant's carelessness, had caused the crash and that, therefore, the Administrator's order should have been immediately dismissed and was not substantially justified after that time.

Applicant had presented evidence that the left actuator rod had been bent and chafed and had argued that this caused the gear to collapse. Applicant claims that this cause of the accident is confirmed by the left gear having been crushed into the outside of the left inner gear door. According to applicant, the Administrator's theory is facially flawed because, had he inadvertently raised the gear, the left inner gear door would have dropped vertical to the runway until the gear came up and would have been torn off or sustained damage to its outboard edge, not the damage it did actually sustain. Applicant further argues that, had he inadvertently retracted the gear, the squat switch would have overridden the "up" command because there was weight on the left landing gear.

Whether the Administrator proceeds reasonably in fact is not

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<sup>3</sup>To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory. Application of US Jet, NTSB Order EA-3817 (1993). Whether the Administrator's position was reasonable in fact is the only issue before us.

equivalent to whether he could prevail at trial, proving his case by a preponderance of the evidence, whether he could make a prima facie case, or whether applicant's theory is possible. Instead, the question here is whether the Administrator relied on a reasonable interpretation of the physical facts in pursuing the complaint for the time he did after the informal conference. Accord Pierce v. Underwood, 487 U.S. 552, 565 (1988) (the question is whether the Administrator's case is justified to a degree that could satisfy a reasonable person). Here, the Administrator's theory meets this test and his doubts about applicant's theory -- that it did not fit all the facts -- offer a reasonable explanation for continuation of the proceeding.

The record suggests three significant difficulties with applicant's theory of the accident. First, applicant's appeal here relies on a contention that the Administrator offers proof of expert testimony, unrebutted by applicant, that the left landing gear's bent and worn actuator rod (on which applicant greatly relies as the cause of the accident) could not have caused down-and-locked landing gear to collapse. Second, the damage to the left gear door could have been caused by something other than the landing gear crushing into it. There was damage to both gear doors, and the alleged "dent" in the left gear door (no photos are in evidence) may have been caused by, for example, the aircraft's travel along the ground on or after it left the runway. Third, applicant's theory does not necessarily explain the 34 parallel and simultaneous right and left propeller strikes

along the runway.

The Administrator also considered a thesis, apparently offered at some point by applicant, that the simultaneous propeller strikes were caused either by the aircraft pitching forward when the left gear failed, leading to collapse of the nosewheel gear, or by deflation of the right tire from the pressure when the left gear failed (see mechanic's statement attached to EAJA Application). However, nose gear failure when the aircraft left the runway was also possible, applicant has elsewhere admitted that the nose gear collapsed later in the sequence of events,<sup>4</sup> and the aircraft is designed so that propellers will not strike the ground even if tires deflate.

Overall, we cannot find the Administrator's concerns with applicant's theory to have been unreasonable so as to compel earlier dismissal (or dismissal at all). The Administrator, faced with a complex set of facts, conducted a thorough investigation and fully considered applicant's competing hypotheses. As the law judge found, the Administrator was entitled to rely on the expert analysis of his investigators when the investigation on which that analysis was based is not shown incomplete or obviously flawed. Applicant would have had the Administrator dismiss his complaint as soon as applicant offered the Administrator an alternative cause for the accident (a cause

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<sup>4</sup>Appeal at 2 (the nose gear had folded when the aircraft left the runway). We also note that the mechanic's attachment to applicant's EAJA Application states that "both props [struck] the runway for a distance before the nose gear collapsed[.]

that would exonerate applicant). Although it is true that the decision to settle could be read to suggest that the Administrator had more doubts than he has presented here, it would be inappropriate for many reasons to assume, as applicant does, that the Administrator dismissed his order because he accepted the applicant's explanation of events. That the Administrator chose not to dismiss the case until some time later than applicant would like was not, in our view, unreasonable.<sup>5</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Applicant's appeal is denied; and
2. The initial decision is affirmed to the extent set forth in this opinion.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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<sup>5</sup>In light of our disposition, there is no need to reach applicant's supplemental filing.